A stay is necessary to prevent these losses from growing exponentially. Based on Verizon VA's initial review of the ordered inputs, the *Order* will result in radical reductions to UNE rates. For example, the end-office switching rate is the lowest of any jurisdiction served by Verizon. Garzillo Decl. ¶ 13. Similarly, the UNE-P rate for residential customers in zone 1 under the *Order* — where approximately three-quarters of the lines in Virginia are located — is the second lowest when compared to similar rates in every one of the thirty-one jurisdictions where Verizon provides service. Id. ¶ 14. And the non-recurring rates have been slashed dramatically: for example, the non-recurring charge for installing a new unbundled loop is decreased by more than 90 percent to less than $5.00. Id. ¶ 16. These rate reductions will cause Verizon VA's losses to grow dramatically because it will recover even fewer of its costs for every UNE-P it provides and it will lose even more customers and the associated retail revenues. The courts and the Commission have recognized that such substantial financial losses can in and of themselves constitute irreparable harm.[44/]

The *Order* also will cause irreparable injury because the approximately 50% reduction in high capacity loop rates will result in significantly lower rates for EELs. Combined with the Commission's new rules concerning the availability of EELs, the *Order*'s rate reductions will

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amortization. The discounts from total cost are *50%-60%* below total cost even when total cost does not include cost of equity . . . .").

44/ *See, e.g.*, Memorandum Opinion and Order, *TCI Cablevision of Dallas, Inc.*, 15 FCC Rcd 7379, 7381 ¶ 6 (2000) (granting preliminary injunctive relief where company faced irreparable harm if its scheduled rate increase was delayed, because "it lack[ed] assurance it [could] later recoup lost revenue in an increasingly competitive marketplace"); *see also Petereit v. S. B. Thomas, Inc.*, 63 F.3d 1169, 1186 (2d Cir. 1995); *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 43 (D.D.C. 2000) (financial losses "above and beyond a simple diminution in profits" constitute irreparable harm); *McGregor Printing Corp. v. Kemp*, Civ. A. No. 91-3255, 1992 WL 118794, at *5 (D.D.C. May 14, 1992) (finding "irretrievable monetary loss" to plaintiff amounted to irreparable harm).

cause widespread conversion of special access services to EELs. *See* Garzillo Decl. ¶¶ 34-36. As the Commission has explained, such dislocation will have "severe consequences" for the special access market.[45] In particular, the Commission concluded that, while special access is a "mature source of competition," conversion of special access service to below-cost EEL prices will "undercut the market position of many facilities-based competitive access providers." *Id.* That is precisely what the *Order* would do to the market in Virginia.

The *Order* also will cause Verizon VA to lose customers and goodwill as CLECs take advantage of the arbitrage opportunities and subsidies resulting from the dramatically lower rates. The courts have recognized that, "when the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor . . . the irreparable injury prong is satisfied." *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994). As the Commission has explained in words equally applicable here, "Petitioner [is] already losing customers to [the CLECs] and, if we do not order a standstill, they are likely to continue to do so. If we later find the agreement to be unlawful, it will be very difficult to remedy these losses without serious disruptions in service to the public and, indeed, it is possible that customers who have migrated to [the CLECs] pursuant to the agreement will never return to their previous carriers."[46]

45/ Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587, 9598 ¶ 18 (2000).

46/ *See, e.g.*, Memorandum Opinion and Order, *AT&T Corp., et al., v. Ameritech Corporation and Qwest Communications Corp.*, 13 FCC Rcd at 14512-13, 14521, 14523 ¶¶ 8, 27, 32-33; Memorandum Opinion and Order, *CBS Communications Servs.*, Inc., 13 FCC Rcd 4471 (1998); *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001) (finding that the loss of established goodwill because of higher rates may result in irreparable harm); *see also Illinois Bell Tel. Co. v. MCI Telecom. Corp.*, No. 96 C 2378, 1996 U.S. Dist. LEXIS 18337, at *26-*27 (N.D. Ill. Dec. 3, 1996 ("[I]t is virtually impossible to ascertain the precise economic consequences of intangible harms, such as damage to reputation and loss of goodwill, that flow from such

Nor is there any plausible claim that the harms are merely the result of competition. On the contrary, the opposite is true. Permitting the *Order* to go into effect would irreparably harm Verizon VA by severely constraining its ability to compete in the marketplace, an injury the Commission and the courts have recognized as constituting irreparable harm.[47/] Verizon VA, like any carrier, must face real competition from wireless, cable, and other facilities-based providers. But it will be severely compromised in its ability to do so if it must, at the same time, subsidize competitors that use its network to provide service and capture its market share. The rates resulting from the *Order* would exacerbate this problem by further increasing those subsidies. CLECs using UNEs could severely undercut Verizon VA's prices, while Verizon VA would be forced to charge its remaining customers much higher rates if it hoped to recoup its costs. Even if the rates are eventually reversed on review, Verizon VA has no guarantee that it will be able to regain the competitive position that it lost as a result of the unlawful rates.

A stay is also necessary to protect the public interest. The reduced UNE-P rates produced by the *Order* will reduce facilities-based competition in Virginia even further. The October 2002 rate reductions already have caused a shift from facilities-based competition to UNE-P: the number of UNE-P lines has escalated from approximately 49,000 lines at the time of the reductions to 250,000 by September 2003, while the number of UNE-P lines added monthly has grown from 4,000 to a current monthly run rate of approximately 25,000. *See* Garzillo Decl. ¶ 22.

[intangible harms]. Loss of market share is also irreparable injury, because market share is difficult to recover") (citations omitted).

47/ *See, e.g.*, Memorandum Opinion and Order, *In re Applications of Petroleum Communications, Inc.*, FCC File No. 30003-CL-P-84, 1985 FCC LEXIS 2515, at *3 (rel. Sept. 30, 1985) (finding irreparable harm where petitioner "will be competitively disadvantaged" if its competitor could serve certain customers, "even temporarily."); *Independent Bankers Ass'n of Am. v. Smith*, 534 F.2d 921, 929-30, 951-52 (D.C. Cir. 1976) (granting stay where petitioners faced losses from "acute competitive disadvantage").

This increase in UNE-P has come at the expense of facilities-based competition. For example, while competitors were adding nearly 16,000 lines per month in whole or in part over their own facilities prior to the rate reduction, that number has dropped by more than half. *See id.* ¶ 23. And, while competitors were adding more than 1,500 lines per month using their own switches together with unbundled loops prior to the rate reduction, competitors have been shedding an average of more than 1,800 such lines each month since. *See id.* The total number of UNE-L lines that competitors are now serving in Virginia is actually *lower* than it was as of year-end 2001. *See id.* ¶ 24.

Exacerbating this trend through even lower UNE rates would be contrary to the public interest. Consumers benefit through the development of facilities-based competition, since only such competition produces product differentiation and genuine choice. On the other hand, the "competition" generated by overly low UNE rates is "synthetic" and does not further "Congress's purposes" — that is, the promotion of "investment and facilities-based competition." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002), *cert. denied, sub nom. WorldCom, Inc. v United States Telecom Ass'n*, 123 S. Ct. 1571 (2003). Instead, as numerous investment analysts have concluded, low UNE-P rates deter investment in facilities by *all* carriers and devalue existing facilities investment. As independent analysts at McKinsey & Co. and JP Morgan have explained, "[n]o company will deploy and scale facilities if it can achieve similar economics immediately by renting network elements from the ILECs – all with little up-front investment."[48/] Similarly, as Scott Cleland of the Legg Mason Precursor Group put it, "why

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[48/] McKinsey & Co. and JP Morgan H&Q, *Broadband 2001, A Comprehensive Analysis of Demand, Supply, Economics, and Industry Dynamics in the U.S. Broadband Market* at 18 (Apr. 2, 2001); *see also Hearings before the Subcomm. on Telecommunications Trade & Consumer Protection of the House Commerce Comm.*, 106th Cong. 2 (May 25, 2000) (Written statement of overbuild if one can lease it more cheaply than one can build it?"[49] Simply put, "UNE-P functions like a tax on investment, rather than a competitive incentive,"[50] and that effect is necessarily aggravated by lower UNE-P rates. And allowing the below TELRIC rates produced by the *Order* to go into effect would result in massive and unjustifiable disruption in the period until it is reversed.[51]

Moreover, the harm to competition threatened by the *Order* will not necessarily be limited just to Virginia. Even if the *Order* is eventually reversed, as it must be, it is likely to be used in the interim to distort other state commission UNE rate decisions. While the *Order* has no binding effect on state commissions in their own UNE arbitration proceedings,[52] CLECs already have and inevitably will continue to portray this decision as representing an authoritative interpretation of

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Scott Cleland, Managing Director, The Precursor Group) ("Cleland Statement") ("[T]he macroeconomic consequences of the FCC's TELRIC fiat was to devalue three quarters of the Nation's telecom infrastructure by two-thirds.").

49/ Cleland Statement at 2; *see also* Scott Cleland, Precursor Group, *Why UNE-P Is Going Away: Telecom Competition's Changing Trajectory* (Oct. 2, 2002); Gregory P. Miller, et al., Fulcrum Global Partners, *Wireline Communications: Thoughts on FCC Order* at 2 (Feb. 25, 2003) ("Six years following the Act, we are left with virtually no structural incentive for any company to ever build an alternative local network that will compete with local carriers over time").

50/ *See* Scott Cleland, Precursor Group, "*Why UNE-P Is Going Away: Telecom Competition's Changing Trajectory*" (Oct. 2, 2002).

51/ The Commission has recognized such market disruption warrants a stay. *See, e.g.*, Memorandum Opinion and Order, *American Telephone and Telegraph Company, Revisions to Tariff No. 260 Establishing Rates for Leased Voice-Grade Channels and 48 kHz Channels between the U.S. Mainland and Hawaii*, 70 F.C.C.2d 1297, 1300-01 ¶ 9 (1978) ("[I]t is our judgment that the public interest benefits gained by delaying for five months imposition of a rate whose lawfulness is in question is outweighed by the public interest benefit of allowing prices to stabilize as a result of normal competitive marketplace interaction.").

52/ *See, e.g.*, *MCIMetro Access Transmission Servs. L.L.C. v. BellSouth Telecomm., Inc.*, No. 5:01-CV-921-H(4), at 13-14 (E.D.N.C. Jan. 18, 2003) (noting that Bureau *non-cost* arbitration decision was non-binding because it was not final agency action and because the Bureau was merely "acting in the place of a state commission").

TELRIC by the Commission. Indeed, in a letter it recently filed with the Maryland Commission, Covad portrayed the *Order* as a "ruling issued . . . by the Federal Communications Commission" and cited it in support of Covad's extreme proposals concerning non-recurring rates.[53] Where a decision will have "far reaching impact . . . the status quo should be maintained until" the reviewing body "has spoken."[54] Nor would the effects of the *Order* be easy to unwind: even if it were swiftly reversed, Verizon VA would have to go back and try to win back customers it lost because of artificially low UNE rates in numerous jurisdictions. As the Commission itself has recognized, where it would be "virtually impossible to 'unscramble' the effects" of a decision and "return to the current status quo," the "public interest factors . . . . weigh heavily in favor of granting the standstill order." *AT&T Corp. v. Ameritech Corp.* at 14519-20 ¶ 24.

The true-up required in the *Order, see Order* ¶ 26, cannot fully redress all these harms. Even if the true-up compensates Verizon VA for some measure of the losses it will incur as a result of the *Order,* a true-up cannot redress the devaluation of Verizon VA's investment or the

53/ Covad Letter to Md. Pub. Serv. Comm'n, Case No. 8879 (Sept. 4, 2003); *see also* Letter from David Carpenter, Counsel for Voices for Choices and AT&T, to Gina Agnello, Clerk, U.S. Court of Appeals for the Seventh Circuit, at 1 (Sept. 9, 2003) (stating that the Bureau's *Order* "confirms" that AT&T's positions are consistent with TELRIC); Ex Parte Submission of AT&T Communications of California, Inc. (U5002C), "Comparison of Cost Models and Studies," *Joint Application of AT&T Communications of California, Inc. (U5002C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Switching in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050, et al.* (Sept. 26, 2003) (referring throughout to the *Order's* determinations for support); *cf. AT&T Communications of NJ. L.P. et al. Amended Petition for Arbitration of Interconnection Terms and Conditions with Verizon New Jersey Inc., Docket No. TO00110893*, at 12 (N.J. Bd. Of Pub. Utils. Nov. 6, 2002) (stating that the Bureau's decision on *non*-cost issues "reflects the reasoned application by the FCC of the very rules that Congress charged it with crafting").

54/ *Anderson v. City of Philadelphia*, C.A. No. 86-7571, 1987 U.S. Dist. LEXIS 8843, at *6-*7 (E.D. Pa. 1987) (granting stay pending appeals court decision that would determine validity of use of polygraph tests in hiring where many similar cases were pending in other districts).

harm to facilities-based competition that will result from the CLEC subsidies created by the *Order*'s rates. And the effect of the *Order's* low rates can be expected to spread: there is no prospect that CLECs will engage in rational negotiations to produce more realistic rates now that the *Order* has set a new, low price ceiling.

Finally, a stay would not cause harm to CLECs. It would simply preserve the *status quo*, which is the proper role of injunctive relief.[55/] A stay would keep in place the UNE rates that the Commission has already determined are TELRIC-compliant. *See Virginia 271 Order* at 21929 ¶ 89. Moreover, the existing rates in Virginia are lower than the corresponding rates in New York, where CLECs already have taken approximately two million lines as UNE-Ps. Indeed, as noted above, since the current rates went into effect in Virginia, use of UNE-P has grown dramatically. Thus, "there is little indication that a stay pending appeal will result in substantial harm to the" CLECs.[56/]

On the contrary, a stay would leave in place rates that already produce an enormous subsidy and provide CLECs with a large profit margin. A Legg Mason study showed that UNE-P yields average gross margins ranging from *47% to 66%* in numerous Verizon states.[57/] And AT&T's Consumer Services president and CEO has assured investors that AT&T is not "going into states where we don't have a *gross margin of 45 percent on the local.* That's kind of our

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55/ *See, e.g., District 50, United Mine Workers of America v. Int'l Union, United Mine Workers of Am.*, 412 F.2d 165, 168 (D.C. Cir. 1969) ("The usual role of preliminary [relief] is to preserve the status quo pending the outcome of litigation.").

56/ *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *see also Multi-Channel TV Cable Co.*, 22 F.3d at 553 (balance of equities favors a stay where status quo permits both parties to "compete in an open market")

57/ Michael J. Balhoff, et al., Legg Mason, *UNE-P Relief: Investors Expect Too Much* at 9 (Dec. 19, 2002).

threshold trigger to go in . . . ."[58] Because AT&T is already providing local service using UNEs in Virginia,[59] it already has a substantial profit margin in Virginia even under the current rates, and the *Order* would simply inflate those profits dramatically. Indeed, as a result of its margins, AT&T already is able to achieve "single customer payback as soon as 11 months," an extremely short time period for a new customer.[60] Thus, a stay will cause no harm to CLECs and should be granted.

CONCLUSION

For the foregoing reasons, the Commission should stay the *Order*.

Submitted by

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58/ Statement of Betsy Bernard, AT&T Consumer Services President and CEO, *Q2 2002 AT&T Earnings Conference Call – Final*, Fair Disclosure Wire, Transcript 072302au.729 (July 23, 2002) (emphasis added).

59/ *See* AT&T Newsroom, http://www.att.com/news/ (news release announcing AT&T entry into Virginia).

60/ David Dorman, AT&T Chairman and CEO, Sanford Bernstein Strategic Decisions Conference at 10 (June 4, 2003).